No. 16-1220

In the Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL., PETITIONERS

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
KRISTEN C. LIMARZI
JAMES J. FREDRICKS
FRANCES MARSHALL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JENNIFER G. NEWSTEAD
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This Court granted certiorari to consider what weight a federal court deciding an issue of foreign law should give to a submission from a foreign government characterizing its own law. The United States has a substantial interest in that question because it affects both the enforcement of federal statutes and the Nation's foreign relations. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 44.1 provides as follows:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may

consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

STATEMENT

This Court granted certiorari to consider whether and under what circumstances a federal court deciding an issue of foreign law under Federal Rule of Civil Procedure 44.1 must treat as conclusive a submission expressing the views of the relevant foreign government. That question can arise in a variety of legal and factual contexts. In the proceedings below, the defendants in a federal antitrust suit contended that they could not be held liable because Chinese law mandated their anticompetitive conduct. They relied in part on an amicus brief in which an agency of the Chinese government endorsed that characterization of Chinese law.

1. Petitioners are two U.S. companies that purchase vitamin C. Respondents are two Chinese exporters of vitamin C. In 2005, petitioners filed a class-action suit against respondents and other Chinese exporters, alleging that they had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by fixing the prices and quantities of vitamin C exported to the United States. Petitioners alleged that the conspiracy had begun in 2001 and that it was accomplished through a membership organization known as the China Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Pet. App. 2a, 4a-5a.

2. Respondents moved to dismiss the complaint. They did not deny that they had fixed the prices and quantities of vitamin C exported to the United States. Pet. App. 163a. Instead, they asserted that their actions

had been compelled by Chinese law and that petitioners' claims were therefore barred by the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity. *Ibid.*

The act of state doctrine may bar a claim that would require a court "to declare invalid [an] official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The foreign sovereign compulsion doctrine provides a limited defense to antitrust liability when a foreign government has required the defendant to engage in the specific conduct that violated the antitrust laws. See *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293-1294 (3d Cir. 1979). And in exceptional cases, principles of international comity may justify the dismissal of a private antitrust suit challenging conduct that occurred abroad. See *id.* at 1297-1298. Here, respondents' invocation of each of those doctrines rested on their assertion that Chinese law had required them to fix the prices and quantities of vitamin C exports. Pet. App. 167a-168a.

The Ministry of Commerce of the People's Republic of China (Ministry) filed an amicus brief supporting respondents' motion to dismiss. Pet. App. 168a; see *id.* at 189a-223a. The Ministry had entered into a joint-defense agreement with respondents and the Chamber. *Id.* at 237a. The Ministry explained that it is "the equivalent * * * of a cabinet level department" and the entity within the Chinese government that regulates foreign trade. *Id.* at 190a. The Ministry stated that the Chamber was a state-supervised entity authorized to regulate vitamin C exports. *Id.* at 201a. And the Ministry argued that Chinese law in force during the relevant period had "compelled" respondents "to coordinate export

prices and maximum export volumes" on pain of "severe penalties." *Id.* at 212a-213a.

Petitioners disputed that understanding of Chinese law. They noted that the Chamber had publicly described the exporters' agreement on vitamin C prices and quantities as a "self-regulated agreement" that was adopted "voluntarily" and "without any government intervention." Pet. App. 173a-174a (citation and emphases omitted). Petitioners also submitted evidence acquired through limited discovery, which in their view showed that respondents and other Chinese exporters had "voluntarily restricted export volume and fixed prices for vitamin C." *Id.* at 175a.

The district court denied the motion to dismiss. Pet. App. 157a-188a. The court held that the Ministry's description of Chinese law was "entitled to substantial deference." *Id.* at 181a. But it declined to treat the Ministry's brief as "conclusive," based in part on its view that "the plain language of the documentary evidence submitted by [petitioners] directly contradict[ed] the Ministry's position." *Ibid.* Under those circumstances, the court found the record "too ambiguous to foreclose further inquiry" into Chinese law. *Id.* at 186a.

3. After additional discovery, respondents moved for summary judgment, again invoking the act of state doctrine, the foreign sovereign compulsion defense, and principles of international comity. Pet. App. 55a. The Ministry submitted a statement reiterating its position that Chinese law had compelled respondents' conduct. *Id.* at 97a n.24; see J.A. 247-251. Petitioners cited additional evidence supporting their contrary view, including documents in which China had represented to the World Trade Organization (WTO) that it "gave up 'export administration ... of vitamin C'" at the end of

2001. Pet. App. 74a (citation omitted). The district court denied respondents' summary-judgment motion, concluding that Chinese law "did not compel their illegal conduct." *Id.* at 56a; see *id.* at 54a-156a.

a. The district court explained that, under Federal Rule of Civil Procedure 44.1, the determination of foreign law "is an issue of law" to be decided based on "any relevant material or source." Pet. App. 93a (citations omitted). The court concluded that a foreign government's characterization of its laws warrants deference, but is not "entitled to absolute and conclusive deference." *Id.* at 97a. Here, the court accepted the Ministry's "explanation of the relationship between the Ministry and the Chamber," but "respectfully decline[d] to defer to the Ministry's interpretation" of the Chinese law governing respondents' conduct. *Id.* at 117a-118a.

The district court gave several reasons for declining to adopt the Ministry's view. First, it emphasized that the Ministry's submissions had "fail[ed] to address critical provisions of the [governing legal regime] that, on their face, undermine its interpretation." Pet. App. 119a; see *id.* at 97a & n.24, 132a-133a. Second, the court noted that the Ministry's most recent statement "d[id] not cite" legal authorities, *id.* at 120a, and that the Ministry's earlier amicus brief "was less than straightforward" because it implied that a 1997 regime remained in force even though that regime had been "superseded" in 2002, *id.* at 132a n.45. Third, the court emphasized that the Ministry had "ma[de] no attempt to explain China's representations [to the WTO] that it gave up export administration of vitamin C"—representations that "appear[ed] to contradict the Ministry's position." *Id.* at 121a. Under those circumstances, the court concluded that "the Ministry's assertion of compulsion

[wa]s a post-hoc attempt to shield [respondents'] conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period." *Id.* at 121a-122a.

b. The district court then conducted its own analysis of the "traditional sources" for determining foreign law, including the relevant "governmental directives" and the records kept by the Chamber and by respondents. Pet. App. 117a & n.36; see *id.* at 122a-155a. The court determined that, although the Ministry may have supported respondents' actions, Chinese law did not compel them to fix the prices and quantities of vitamin C exports.

The district court concluded, for example, that exporters had "unilateral authority to suspend" the legal regime that assertedly required them to adhere to agreed-upon prices. Pet. App. 124a. The court stated that this authority "standing alone" was "sufficient reason to deny summary judgment." *Id.* at 125a. The court further explained that, even if Chinese law had required respondents to agree on and adhere to minimum prices, it did not compel their agreements to limit quantities. *Id.* at 126a-127a. The court stated that the factual record reinforced its view, because there was no evidence that Chinese exporters had faced penalties for failing to adhere to agreed-upon quantities or for "failing to reach agreements [on prices or quantities] in the first instance." *Id.* at 151a; see *id.* at 149a-151a.

c. In the absence of compulsion by Chinese law, the district court held that respondents were not entitled to summary judgment under any of the doctrines they had invoked. Pet. App. 98a-115a. With respect to international comity, the court determined that other comity considerations did not support dismissal because this case was "no different than any other worldwide price-

fixing conspiracy by foreign defendants that includes the United States as one of its primary targets." *Id.* at 102a; cf. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

4. The case proceeded to trial, and a jury found that respondents had agreed to fix the prices and quantities of vitamin C exports. Pet. App. 11a; see *id.* at 276a-279a.[1] The jury also found that respondents were not "actually compelled" by China to enter into those agreements. *Id.* at 278a. The district court entered judgment for petitioners, awarding roughly $147 million in treble damages and enjoining respondents from further violations of the Sherman Act. *Id.* at 11a.

5. The court of appeals reversed. Pet. App. 1a-38a. The court held that the district court should have granted respondents' motion to dismiss based on comity, and it remanded with instructions to dismiss petitioners' complaint with prejudice. *Id.* at 38a.

The court of appeals based its comity analysis on a "multi-factor balancing test" drawn from *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 614-615 (9th Cir. 1976), and *Mannington Mills*, 595 F.2d at 1297-1298. Pet. App. 14a-15a. The court focused primarily on the first factor, which asks whether there was a "true conflict" between U.S. and Chinese law—that is, whether "Chinese law required [respondents] to enter into horizontal price-fixing agreements." *Id.* at 19a.

The court of appeals stated that the answer to that question "hinge[d] on the amount of deference" owed to the Ministry's characterization of Chinese law. Pet.

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[1] Respondents' co-defendants settled before or during the trial. Pet. App. 39a n.1.

App. 20a. The court acknowledged that some courts have declined to "accept such statements as conclusive." *Id.* at 20a-21a. But the court disagreed with those decisions, holding instead that when a foreign sovereign "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer." *Id.* at 25a.

The court of appeals then held, based on the Ministry's amicus brief, that "Chinese law required [respondents] to engage in activities in China that constituted antitrust violations here in the United States." Pet. App. 27a. In reaching that conclusion, the court generally limited its inquiry to the analysis in the Ministry's brief. It did not consider the apparently contradictory statements and authorities on which the district court had relied, and it did not address the district court's criticisms of the Ministry's submissions. *Id.* at 27a-33a.

Having found a true conflict, the court of appeals stated that the remaining comity factors "clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction." Pet. App. 33a. The court noted, for example, that respondents are Chinese companies, that their conduct had occurred in China, and that (according to the Ministry) this suit had "negatively affected U.S.-China relations." *Id.* at 34a-35a.

SUMMARY OF ARGUMENT

When a federal court deciding a question of foreign law under Rule 44.1 is presented with the views of the relevant foreign government, it should ordinarily afford those views substantial weight. But the ultimate responsibility for determining the governing law lies with the

court, which is neither bound to adopt the foreign government's characterization nor barred from considering other materials that support a different interpretation.

A. Until 1966, federal courts followed the common-law rule that foreign law must be pleaded and proved as a fact. Rule 44.1 abandoned that cumbersome approach and sought to align the process of determining foreign law more closely with the process of determining domestic law. The rule specifies that issues of foreign law must be decided as questions of law, and it grants courts broad latitude to determine foreign law based on "any relevant material or source." Fed. R. Civ. P. 44.1.

B. Federal courts determining foreign law are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But courts have correctly recognized that the appropriate weight depends on the circumstances. Given the diversity of foreign legal systems and the wide range of ways in which foreign governments present their views to U.S. courts, those circumstances cannot be reduced to a formula or rule. The relevant considerations include the interpretation's clarity, thoroughness, and support; its context and purpose; the nature and transparency of the foreign legal system; the role and authority of the entity or official offering the interpretation; its consistency with the foreign government's past positions; and any other corroborating or contradictory materials.

C. The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings" and offers an interpretation that is "reasonable under the circumstances," "a U.S. court is bound to defer." Pet. App. 25a. In applying that standard, the

court limited its inquiry to the analysis in the Ministry's brief. *Id.* at 27a-29a. The court thus effectively held that a federal court is bound to adopt a foreign government's submission characterizing its own law so long as it is *facially* reasonable. That rigid rule is unsound.

1. The court of appeals' approach departs from the policies embodied in Rule 44.1. A rule that does not permit a court even to consider relevant information casting doubt on a foreign government's submission is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1. And a rule that a federal court must accept any facially reasonable litigating position a foreign government may assert concerning its own laws is inconsistent with Rule 44.1's direction that courts are free to look beyond the parties' submissions to reach accurate conclusions about the meaning of foreign law.

2. The court of appeals' approach is also inconsistent with federal courts' treatment of submissions by U.S. States characterizing their laws. This Court has held that such submissions are entitled to significant but not controlling weight. Nothing in the text, history, or purposes of Rule 44.1 suggests that a federal court must give greater weight to a submission from a foreign sovereign than it would give to a similar submission from a domestic one.

3. The court of appeals believed that its rigid approach was compelled by *United States* v. *Pink*, 315 U.S. 203 (1942). In that case, which predated Rule 44.1, this Court stated that an "official declaration by the Commissariat of Justice" of the Russian Socialist Federal Soviet Republic was "conclusive" evidence of the extraterritorial reach of a Russian decree. *Id.* at 218,

220. But that statement was premised on a finding that the Commissariat "ha[d] power to interpret existing Russian law," *id.* at 220, and there was no indication that the declaration—which had been obtained by the United States through diplomatic channels—was subject to question. The Court's statement that the declaration was "conclusive" under those unusual circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

4. The court of appeals also reasoned that a foreign government should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. But the United States has not argued that foreign courts are bound to accept its characterizations of U.S. law or precluded from considering other relevant material, and we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight.

D. Because the court of appeals concluded that the district court was bound to defer to the Ministry's amicus brief, it did not review "the district court's careful and thorough treatment" of the materials bearing on the meaning of Chinese law. Pet. App. 30a n.10. The question whether the district court correctly interpreted Chinese law is not before this Court, and we do not take a position on it. But the materials the district court identified were, at minimum, relevant to the question whether Chinese law required respondents' conduct. The Court should therefore vacate the decision below and remand to allow the court of appeals to consider that question under the correct standard.

ARGUMENT

A FEDERAL COURT DETERMINING FOREIGN LAW IS NOT BOUND BY THE VIEWS EXPRESSED IN A SUBMISSION FROM THE RELEVANT FOREIGN GOVERNMENT

Federal Rule of Civil Procedure 44.1 provides that a federal district court faced with a question of foreign law should resolve it as a matter of law and may base its determination on "any relevant material or source." A submission expressing the views of the foreign government is highly relevant, and courts should ordinarily afford such submissions substantial weight. As in other contexts, however, the ultimate responsibility for determining the governing law lies with the court. The court is neither bound to adopt the characterization urged by the foreign government nor barred from considering materials that support a different interpretation.

A. Rule 44.1 Grants Federal Courts Broad Latitude To Decide Questions Of Foreign Law Based On Any Relevant Material Or Source

1. Federal courts encounter questions of foreign law in many different contexts. In some cases, choice-of-law principles point to foreign law as the rule of decision for the parties' dispute. See, *e.g.*, *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 3-4 (1975) (per curiam). In others, foreign law controls or bears upon a specific issue in a case that is otherwise governed by U.S. law:

- As this case illustrates, foreign law may in some circumstances prevent the imposition of liability under the U.S. antitrust laws. See p. 3, *supra*.
- The Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A), impose civil and criminal penalties for the importation of "fish or wildlife taken, possessed, transported, or sold in violation of * * *

any foreign law." See, *e.g.*, *United States* v. *Mitchell*, 985 F.2d 1275, 1279-1280 (4th Cir. 1993).

- A mail- or wire-fraud prosecution may be based on a scheme to defraud involving foreign property, which may require "a court to recognize foreign law to determine whether the defendant violated U.S. law." *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005).
- The application of the federal tax laws sometimes turns on "foreign law." *Guardian Indus. Corp.* v. *United States*, 477 F.3d 1368, 1371 (Fed. Cir. 2007) (citation omitted) (credits for payment of foreign taxes).
- A contract governed by foreign law may provide a defense to a claim under federal intellectual-property law. See, *e.g.*, *Bodum USA, Inc.* v. *La Cafetiere, Inc.*, 621 F.3d 624, 625-628 (7th Cir. 2010).
- A foreign law prohibiting disclosure may in some circumstances excuse or affect the remedy for noncompliance with an order requiring the production of documents located abroad. See *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 544-546 & n.29 (1987) (*Aérospatiale*).
- Federal Rule of Civil Procedure 4(f), which governs service of process in a foreign country, incorporates "the foreign country's law for service in that country." Fed. R. Civ. P. 4(f)(2)(A); see, *e.g.*, *Prewitt Enters., Inc.* v. *Organization of Petroleum Exporting Countries*, 353 F.3d 916, 923-

924 & n.11 (11th Cir. 2003), cert. denied, 543 U.S. 814 (2004).

2. English and American common law treated foreign law "as a question of fact to be pleaded and proved as a fact by the party whose cause of action or defense depend[ed] upon alien law." Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 617 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 37-38 (1801); see, *e.g.*, *Church* v. *Hubbart*, 6 U.S. (2 Cranch) 187, 236-237 (1804) ("Foreign laws are well understood to be facts.").

Treating questions of foreign law as questions of fact "had a number of undesirable practical consequences." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2441, at 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Courts were restricted to the evidence submitted by the parties. *Ibid.* And appellate review was deferential and limited to the record made in the trial court. *Ibid.*

After the adoption of the Federal Rules of Civil Procedure in 1938, some federal courts began to invoke state procedures that departed from the common-law approach by allowing courts to take judicial notice of foreign law. Miller 654-656; see Fed. R. Civ. P. 43(a) (1964) (incorporating state evidentiary rules). But those state procedures varied, and some were "time consuming and expensive." Fed. R. Civ. P. 44.1 advisory committee's note (1966) (Adoption) (Advisory Committee's Note).

The process of determining foreign law thus remained "cumbersome." *Pasquantino*, 544 U.S. at 370.

3. In 1966, this Court promulgated Rule 44.1 to "furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country." Advisory Committee's Note. The rule accomplishes that goal by providing that, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. The rule also specifies that the court's determination "must be treated as a ruling on a question of law," rather than as a finding of fact. *Ibid.*[2]

Rule 44.1 "improves on [the procedures] available at common law." *Pasquantino*, 544 U.S. at 370. By allowing courts to rely on any relevant material, regardless of its admissibility under the Federal Rules of Evidence, the rule "provides flexible procedures for presenting and utilizing material on issues of foreign law." Advisory Committee's Note. By specifying that the court's determination is a conclusion of law, the rule ensures de novo appellate review. *Ibid.* And by providing that courts are not limited to materials submitted by the parties, the rule recognizes that courts "may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." *Ibid.* The "obvious" purpose of those changes was "to make the process of determining alien law identical with the method of ascertaining domestic law to the

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[2] Federal Rule of Criminal Procedure 26.1 establishes "substantially the same" rule for criminal cases. Fed. R. Crim. P. 26.1 advisory committee's note (1966) (Adoption). Given that similarity, this brief relies on decisions applying both rules.

extent that it is possible to do so." 9A Wright & Miller § 2444, at 338-342.

Courts deciding questions of foreign law under Rule 44.1 rely on a variety of materials, including "[s]tatutes, administrative materials, and judicial decisions"; "secondary sources such as texts and learned journals"; "expert testimony"; and "any other information" that may be probative. 9A Wright & Miller § 2444, at 342-343 (3d ed. 2008 & Supp. 2017). In evaluating those materials, a court "is free * * * to give them whatever probative value [it] thinks they deserve." *Id.* at 343. The guiding principle is that courts "should use the best of the available sources" to reach an accurate interpretation of foreign law. *Bodum USA*, 621 F.3d at 628.

B. A Foreign Government's Characterization Of Its Own Law Is Ordinarily Entitled To Substantial Weight, But Is Not Binding On Federal Courts

Federal courts deciding questions of foreign law under Rule 44.1 are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But the appropriate weight in each case will depend on the circumstances, and a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials.

1. Federal courts considering questions of foreign law may be presented with the views of the relevant foreign government through a variety of formal and informal mechanisms. Often, the foreign state (or one of its agencies or instrumentalities) is itself a party to the litigation. See, *e.g.*, *Northrop Grumman Ship Sys., Inc.* v. *Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 496-498 & n.8 (5th Cir. 2009); *McKesson*

HBOC, Inc. v. *Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001) (*McKesson*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1289, 1312 (7th Cir. 1992) (*Amoco Cadiz*).

As this case illustrates, foreign governments (and their agencies and officials) may also express their views through amicus briefs or similar submissions in cases where no foreign governmental entity is a party. Pet. App. 189a-223a; see, *e.g.*, *United States* v. *McNab*, 331 F.3d 1228, 1239-1240 & n.23 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). Alternatively, a party may submit an affidavit or testimony from a foreign official. See, *e.g.*, *United States* v. *Schultz*, 333 F.3d 393, 400-401 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1109-1110 (S.D. Fla. 1988). Or a party may rely on an interpretation that the relevant foreign sovereign has issued outside the context of the litigation. See, *e.g.*, *Abbott* v. *Abbott*, 560 U.S. 1, 10 (2010) (letter from a Chilean agency); *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (circular issued by a Mexican agency), cert. denied, 531 U.S. 917 (2000).

2. Neither Rule 44.1 nor any other rule or statute specifically addresses the weight that a federal court determining foreign law should give to the views of the foreign government. As a general matter, courts in deciding such questions should be guided by principles of international comity, "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Aérospatiale*, 482 U.S. at 543 n.27. In other

contexts, this Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Id.* at 546. To afford appropriate respect for "[t]he dignity of a foreign state," *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008), a federal court should carefully consider that state's proffered views about the meaning of its own laws.

Granting substantial weight to the views of the relevant foreign government is also eminently sensible. "Among the most logical sources for [a] court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country," who are intimately familiar with the context and nuances of the foreign legal system. *McNab*, 331 F.3d at 1241; cf. *Bodum USA*, 621 F.3d at 638-639 (Wood, J., concurring) (noting the risk that an unaided U.S. reader may "miss nuances in the foreign law"). Ordinarily, a court therefore "reasonably may assume" that interpretations offered by the relevant foreign agencies or officials "are a reliable and accurate source" of the meaning of foreign law. *McNab*, 331 F.3d at 1241.

3. The federal courts have generally adhered to the foregoing principles. Courts have recognized that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), cert. denied, 539 U.S. 904 (2003); see, *e.g.*, *Access Telecom*, 197 F.3d at 714 ("[C]ourts may defer to foreign government interpretations."); *Amoco Cadiz*, 954 F.2d at 1312 ("A court of the United States owes substantial deference to the construction France places on its domestic law."). In *Abbott*, for example, this Court

stated that the views of a Chilean agency were "notable" and "support[ed] the [Court's] conclusion" about the meaning of Chilean law. 560 U.S. at 10.

Courts have not, however, treated a foreign government's characterization of its own law as binding. Instead, they have recognized that the weight given to such a characterization should depend on the circumstances. For example, when "a foreign government changes its original position" or otherwise makes conflicting statements, a court is not bound to accept its most recent statement, or the one offered in litigation. *McNab*, 331 F.3d at 1241; see, *e.g.*, *Export-Import Bank of the Republic of China* v. *Central Bank of Liberia*, No. 15-cv-9565, 2017 WL 1378271, at *4 (S.D.N.Y. Apr. 12, 2017). A court likewise may decline to adopt an interpretation if it is unclear or unsupported, if it fails to address relevant authorities, or if it is implausible in light of other relevant materials. See, *e.g.*, *Themis Capital, LLC* v. *Democratic Republic of Congo*, 626 Fed. Appx. 346, 348 (2d Cir. 2015); *McKesson*, 271 F.3d at 1108-1109.

4. In describing the weight that should be given to a foreign government's views about its own law, parties and lower courts have sometimes borrowed domestic administrative-law standards. See, *e.g.*, Resp. Supp. Br. 2-3; *Amoco Cadiz*, 954 F.2d at 1312. In our view, such analogies are generally unhelpful because those standards are grounded in domestic considerations. For example, courts defer to reasonable agency interpretations under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), in specific circumstances, including when Congress has "delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was

promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). The standard articulated in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), is more flexible, but it too has domestic-law roots and a specific meaning acquired through repeated domestic applications. See *Mead*, 533 U.S. at 234-235.

Those administrative-law doctrines do not readily translate to the Rule 44.1 context. "[T]he world's many diverse legal and governmental systems" differ greatly from ours and from each other. *McNab*, 331 F.3d at 1237 (citation omitted). The views of foreign governments about those varying systems are presented to the federal courts under a wide range of differ[illegible]ircumstances. And the submissions themselves diff[illegible]reatly in their formality, thoroughness, and authority. See pp. 16-17, *supra*. Deference standards that were crafted for specific areas of federal administrative law and that carry decades of accumulated domestic-law meanings are ill-suited for this very different context.

5. Rather than transplanting a standard from domestic administrative law, a federal court confronted with a disputed question of foreign law should proceed in the same manner as a court facing any other unsettled legal question: By seeking to resolve it "with the aid of such light as is afforded by the materials for decision at hand." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 227 (1991) (brackets and citation omitted). As this Court emphasized in addressing the analogous problem of determining the law of former Mexican territories before their annexation into the United States, "it has always been held that it is for the court to decide what weight is to be given" to the legal materials available in

a particular case. *Fremont* v. *United States*, 58 U.S. (17 How.) 542, 557 (1855).

When those materials include an interpretation by the relevant foreign government, that interpretation should be afforded respectful consideration and will ordinarily be entitled to substantial weight. The precise weight that is appropriate in a particular case will necessarily depend on the circumstances. Those circumstances are too diverse to be reduced to a formula or rule, but the relevant considerations include the interpretation's clarity, thoroughness, and support; its context and purpose; the nature and transparency of the foreign legal system; the role and authority of the entity or official offering the interpretation; its consistency with the foreign government's past positions; and any other corroborating or contradictory materials.[3]

C. The Court Of Appeals Erred By Treating The Ministry's Amicus Brief As Binding And By Disregarding Other Relevant Materials

The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented,

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[3] As we explained in our petition-stage brief (at 8-9 n.1), the United States' amicus brief in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), suggested a somewhat more deferential approach. The position we advocate here is consistent with the United States' more recent brief in *McNab*, which endorsed what had by then become the courts of appeals' general practice of affording "substantial—but measured—deference to a foreign nation's representations." U.S. Br. in Opp. at 16-17, *McNab* v. *United States*, 540 U.S. 1177 (2004) (No. 03-622).

a U.S. court is bound to defer." Pet. App. 25a. In applying that standard and concluding that the Ministry's characterization of Chinese law was "reasonable," the court generally limited its inquiry to the four corners of the Ministry's brief and the sources cited therein. *Id.* at 27a-29a. The court also emphasized that a federal court may not "embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations." *Id.* at 26a.

In practical effect, therefore, the court of appeals held that a federal court is bound to adopt a foreign government's submission characterizing its own law—and may not consider other relevant material—so long as that characterization is *facially* reasonable.[4] That rigid rule is inconsistent with the policies underlying Rule 44.1 and with this Court's treatment of analogous submissions from U.S. States. And the court of appeals erred in concluding that its approach was supported by *United States* v. *Pink*, 315 U.S. 203 (1942), or by considerations of comity and reciprocity.

1. The court of appeals' rule of binding deference is inconsistent with the policies embodied in Rule 44.1

As the court of appeals observed, Rule 44.1 does not expressly address the weight a federal court should give to a foreign government's submission characterizing its laws. Pet. App. 22a. In at least two respects, however, the court's approach departs from the policies embodied in that rule.

a. Rule 44.1 seeks to align the treatment of foreign and domestic law by providing district courts with

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[4] The court of appeals left open the possibility that "deference may be inappropriate" if the foreign government's submission includes "no documentary evidence or reference of law." Pet. App. 25a n.8.

broad latitude to "determin[e] foreign law" based on "any relevant material or source." That direction reflects a judgment that "whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials." 9A Wright & Miller § 2444, at 351.

The court of appeals' approach is inconsistent with that sound policy because it precludes a court from considering other relevant material whenever it is presented with a facially reasonable submission from a foreign government. Here, for example, the district court concluded that the Ministry's submissions "fail[ed] to address critical provisions of the [governing legal regime]," Pet. App. 119a, and that they incorrectly implied that a superseded legal regime "was still controlling," *id.* at 132a n.45. The court also highlighted, *inter alia*, China's statement to the WTO that it had "g[i]ve[n] up 'export administration ... of vitamin C'" at the end of 2001, *id.* at 74a (citation omitted), and the Chamber's statements that respondents had "voluntarily" agreed on prices and quantities "without any government intervention," *id.* at 173a-174a (citation and emphases omitted).

The court of appeals did not conclude that the district court's reliance on that material was substantively wrong or irrelevant to the proper interpretation of Chinese law. To the contrary, it stated that, "if the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence * * * would have been entirely appropriate." Pet. App. 30a n.10. But because the Ministry had filed a brief that the court deemed facially reasonable, it concluded that the district court had erred by considering

additional material and thereby "embark[ing] on a challenge to [the Ministry's] official representation." *Id.* at 26a. A standard that does not permit a court even to consider such relevant information is inconsistent with federal courts' responsibility to "determin[e] foreign law" based on "any relevant material or source." Fed. R. Civ. P. 44.1.

b. The court of appeals also departed from the policies embodied in Rule 44.1 by placing dispositive weight on the fact that the Ministry had "directly participate[d]" in the litigation by offering what the court called a "sworn evidentiary proffer." Pet. App. 25a; see *id.* at 23a (distinguishing a case in which the foreign government "did not appear before the court"). That is true for two reasons.

First, the court of appeals' characterization of the Ministry's submission as "a sworn evidentiary proffer," Pet. App. 25a, was inapt. Rule 44.1 abrogated the common-law rule treating questions of foreign law as questions of fact, and it specifies that a district court's determination of an issue of foreign law "must be treated as a ruling on a question of law." Although the Ministry's amicus brief was surely relevant to the district court's determination whether Chinese law required the anticompetitive conduct at issue in this case, that legal brief was neither a "sworn" document nor an "evidentiary proffer." See Pet. Br. 35-36. By the same token, a court that considers but ultimately rejects a foreign government's characterization of its laws does not thereby accuse the foreign government of misrepresenting the pertinent facts. Cf. pp. 26-27, *infra* (explaining that federal courts give significant but not controlling weight to a state attorney general's characterization of state law).

Second, the court of appeals erred by holding that greater deference is required when a foreign government participates directly in litigation. That fact may bear on the weight a foreign government's views should receive. It ensures, for example, that the government has focused on the specific foreign-law issue that is actually before the court. But many other factors also bear on the weight that should be afforded to a foreign government's interpretation, see p. 21, *supra*, and the court of appeals did not explain why it placed dispositive weight on this single consideration. In some circumstances, moreover, a U.S. court might justifiably view a pronouncement prepared for litigation purposes with greater skepticism than it would view a similar pronouncement drafted with no specific controversy in mind. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The court of appeals' rule, moreover, would automatically inure to the benefit of any foreign government that appears in U.S. court as a plaintiff or defendant in a case controlled in whole or in part by its domestic laws—a relatively common occurrence.[5] The court identified no sound reason why a federal court should be

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[5] See, *e.g.*, *Themis Capital*, 626 Fed. Appx. at 348 (suit against the Democratic Republic of Congo to recover debt); *Karaha Bodas*, 313 F.3d at 75, 92 (action to execute on assets owned by Indonesia); *Northrop Grumman Ship Sys.*, 575 F.3d at 496-498 & n.8 (suit against Venezuela for contract damages claimed to be governed in part by Venezuelan law); *McKesson*, 271 F.3d at 1103 (suit against Iran arising out of expropriation of property); *DRC, Inc.* v. *Republic of Honduras*, 71 F. Supp. 3d 201, 209-210 & n.7 (D.D.C. 2014) (suit against Honduras to enforce arbitral award); *Republic of Ecuador* v. *ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 460-461 (S.D.N.Y.

bound, in any suit to which a foreign government is a party, by whatever facially reasonable litigating position that party may assert concerning the proper understanding of its own laws. That result would be particularly anomalous because Rule 44.1 allows courts to look beyond the "material presented by the parties" specifically to ensure that courts have the ability to "reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." Advisory Committee Note. That consideration applies with full force when the litigant is a foreign government.

2. The court of appeals' rule of binding deference is inconsistent with this Court's treatment of analogous submissions from U.S. States

The court of appeals' rule of binding deference is inconsistent with this Court's approach in the other principal circumstance in which federal courts are presented with the views of other sovereigns on the proper interpretation of their laws. When federal courts receive submissions by U.S. States addressing the proper interpretation of state law, the courts give those submissions significant but not controlling weight. Nothing in the text, history, or purposes of Rule 44.1 suggests that a federal court determining foreign law must give greater weight to the views of a foreign sovereign.

This Court has long held that "[t]he law of any State of the Union * * * is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar* v. *Micou*, 114 U.S. 218, 223

2007) (suit by Ecuador seeking to stay arbitration); *Republic of Turkey* v. *OKS Partners*, 146 F.R.D. 24, 27-28 (D. Mass. 1993) (suit by Turkey to recover artifacts); *Government of Peru* v. *Johnson*, 720 F. Supp. 810, 812-814 (C.D. Cal. 1989) (same by Peru).

(1885). If the applicable state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (per curiam); see *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Otherwise, a federal court must "consider all of the available legal sources" to predict "how the state's highest court would answer the open questions." 19 Wright & Miller § 4507, at 178-179 (3d ed. 2016); see *Salve Regina Coll.*, 499 U.S. at 227.

In deciding questions of state law, the views of the State as expressed by its attorney general are "entitled to weight." 19 Wright & Miller § 4507, at 157-158; see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 n.30 (1997) (citing with approval an opinion concluding that the "reasoned opinion of [a] State Attorney General should be accorded respectful consideration"). This Court has made clear, however, that those views are not entitled to "controlling weight." *Stenberg* v. *Carhart*, 530 U.S. 914, 940 (2000); see, *e.g.*, *Virginia* v. *American Booksellers Ass'n.*, 484 U.S. 383, 395 (1988). The court of appeals gave no sound reason for requiring that federal courts give greater weight to the views of foreign governments.

3. This Court's decision in* Pink *does not support the court of appeals' rule of binding deference

The court of appeals believed that its rigid approach was compelled by this Court's pre-Rule 44.1 decision in *Pink*. Pet. App. 20a, 22a-23a. That is not correct. *Pink* arose out of an action brought by the United States to recover assets of the U.S. branch of a Russian insurance company that had been nationalized in 1918 after the Russian revolution. 315 U.S. at 210. In 1933, the government of the Soviet Union assigned the nationalized assets to the United States. *Id.* at 211. The disposition

of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree had reached the assets of the Russian insurance company located in the United States, or instead had been limited to property in Russia. *Id.* at 213-215, 217.

To support its position that the nationalization decree had reached all of the company's assets, the United States obtained an "official declaration by the Commissariat for Justice" of the Russian Socialist Federal Soviet Republic. *Pink*, 315 U.S. at 218. The declaration certified that the decree had reached "the funds and property of former insurance companies * * * irrespective of whether it was situated within the territorial limits of [Russia] or abroad." *Id.* at 220 (citation omitted). This Court held that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid.* "That being true," the Court concluded that the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

This Court's treatment of the declaration as conclusive was thus premised on an independent finding about the Commissariat's authority within the Soviet legal system. *Pink*, 315 U.S. at 220. The declaration was also obtained by the United States, through official "diplomatic channels." *Id.* at 218. The Commissariat's declaration was thus in some respects akin to a state supreme court's answer to a question of state law certified by a federal court. Cf. *Arizonans for Official English*, 520 U.S. at 76-77. There was apparently no indication that the declaration was incomplete or inconsistent with the Soviet Union's past statements, and the Court emphasized that the declaration was consistent with expert evidence that "gave great credence to [the] position"

that the nationalization decree reached property located abroad. *Pink*, 315 U.S. at 218. The Court's statement that the Commissariat's declaration was "conclusive" under those unusual circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

4. Considerations of reciprocity and comity do not support the court of appeals' rule of binding deference

The court of appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. That concern for reciprocity was sound, but it does not support the court's approach. In fact, the opposite is true.

When the United States litigates questions of U.S. law in foreign tribunals, it expects that the views submitted on its behalf will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the United States historically has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant material.[6] And although other nations' approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight.

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[6] Respondents assert (Supp. Br. 7-8) that the United States sought a greater degree of deference in a 2002 submission to a WTO panel. In fact, that submission acknowledged that "the Panel is not bound to accept the interpretation [of U.S. law] presented by the United States." Second Written Submission of the United States of America, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 ¶ 11 (Mar. 8, 2002).

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147, 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 107, 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice that is inconsistent with the court of appeals' approach, and they confirm that the court's rule of binding deference is not supported by considerations of international comity.

D. This Court Should Vacate The Decision Below And Remand The Case To Allow The Court Of Appeals To Apply The Correct Legal Standard

Because the court of appeals concluded that the district court was bound to defer to the Ministry's amicus brief, the court did not consider the shortcomings that the district court had identified in the Ministry's submissions or the other aspects of "the district court's careful and thorough treatment of the evidence before it." Pet. App. 30a n.10. The question whether the dis-

trict court correctly interpreted Chinese law is not before this Court, and we do not take a position on it.[7] But the materials identified by the district court were, at minimum, relevant to the weight that the Ministry's submissions should receive and to the question whether Chinese law required respondents' conduct. This Court should therefore vacate the decision below and remand

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[7] Respondents are wrong in stating (Supp. Br. 6-7) that the United States "affirmed" their interpretation of Chinese law in proceedings before the WTO. Those proceedings involved a different record and other commodities, not vitamin C. See First Written Submission of the United States of America, *China—Measures Related to the Exportation of Various Raw Materials*, DS394, DS395, DS398 ¶ 4 (June 1, 2010). Based on China's representations to the district court in this case—which were against China's interest in the WTO proceeding—the United States argued that export restraints adopted by a different China Chamber of Commerce were "attributable to China" for purposes of China's compliance with its WTO obligations. *Id.* ¶ 208. But in addition to involving different commodities and a different record, the WTO proceeding was governed by a different legal standard. This litigation has focused on the question whether Chinese law *required* respondents to fix the prices and output of vitamin C exports. In contrast, as the WTO panel explained, "[p]rivate actions" have been "found to be 'attributable' to a government, and thus subject to challenge [in WTO proceedings], where there is 'some governmental connection to or endorsement of those actions.'" World Trade Organization, *China—Measures Related to the Exportation of Various Raw Materials: Reports of the Panel*, WT/DS394/R, WT/DS395/R, WT/DS398/R ¶ 7.1004 (July 5, 2011) (citation omitted). That standard may be satisfied even where a nation's law does not *require* the relevant private conduct.

to allow the court of appeals to consider that question under the correct legal standard.[8]

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
KRISTEN C. LIMARZI
JAMES J. FREDRICKS
FRANCES MARSHALL
Attorneys

JENNIFER G. NEWSTEAD
Legal Adviser
Department of State

MARCH 2018

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[8] The court of appeals analyzed Chinese law, and gave controlling weight to the Ministry's characterization of that law, in the course of adjudicating (and sustaining) respondents' comity defense. As we explained at the petition stage (Br. 20), the court's comity analysis was erroneous in other respects as well. For example, the court gave inadequate weight to the interests of the U.S. victims of the alleged price-fixing cartel and to the interests of the United States in enforcement of its laws. Pet. App. 34a-35a. Conversely, the court gave too much weight to China's objections to this suit. *Id.* at 35a. Unlike a statement from the Executive Branch of the U.S. government, a foreign sovereign's objection to a suit does not, in itself, necessarily indicate that the case will harm U.S. foreign relations.